IN THE HIGH COURT OF JUDICATURE AT BOMBAY

NAGPUR BENCH : NAGPUR

Second Appeal No. 233 of 2005

Shri Madhukar son of Gopalrao Naphade,
aged about 64 years,
occupation Advocate,
resident of Dhantoli,
Katol,
Tahsil
& District Nagpur.... Appellant.
[org. Deft. on R.A.]

Versus

Shri Gwaldas son of Nathmali Laddha,
aged about 60 years,
occupation Business,
resident of Dhantoli,
Katol,
Tahsil & Distt. Nagpur.... Respondent.
[org. Plff. on R.A.]

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Mr. S.Y. Deopujari, Advocate for the Appellant.

Mr. M.N. Naidu, Advocate for the Respondent.

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CORAM :A.H.JOSHI, J.

Date :22nd August,2006.

ORAL ORDER:

1. Heard.

2. The facts, in brief, are that the landlord initially issued a notice seeking termination of tenancy. In this notice, he pleaded that the tenancy commenced from 8th day of every month.

The tenant replied the notice, and disputed the proposition, contending that the tenancy commenced from first day.

It seems that the landlord realized the facts or folly in the notice, and issued a fresh notice wherein he claimed that the tenancy commenced from first day. In view of termination of tenancy, landlord filed a suit for possession.

In the suit, landlord averred that in the first notice it was pleaded that the tenancy commenced from 8th day, however, he pleaded that in view of the tenant's reply, the tenancy commenced

from first day.

3. It is seen that the suit proceeded and Trial Court found that the defendant-tenant was making deliberate attempts of delaying the suit. He, therefore, adjourned the case on payment of cost. Tenant had even taken out the proceedings for transfer of the case. It is also an admitted ground that proceedings of contempt of Court were taken on account of the conduct of the defendant and the language used by him in the proceedings. Upon apology by the tenant, the proceedings were dropped.

4. It is further seen that the suit proceeded and it was decreed. The decree has been confirmed in appeal.

This Second Appeal is filed against these concurrent Judgments and Decrees.

5. The learned Advocate has addressed mainly on

two points, namely :-

(a) whether the question of validity of termination of tenancy is pivotal, since, according to the plaintiff, in his first notice, it is mentioned that the tenancy commenced from 8th day of the Gregorian Calendar, while the notice, which was later on issued terminating the tenancy, determines the tenancy from 31st day, whereby the tenancy has not been terminated, statutory time and the notice is illegal and no ejectment on that basis can be sought, and

(b) the trial resulted into want of fair opportunity to the defendant, because he had failed to pay the costs, and by referring to Section 35B, Civil Procedure Code, his defence was struck off and his prayer for recalling of that order or review was also declined erroneously. This was contrary to the scheme of Section 35-B of Civil Procedure Code.

6. The learned Advocate, in order to make his point good, took this Court even through the record

and attempted to show that the defendant did not get fair and reasonable opportunity.

7. This Court would now deal with the appellant's plea about date of commencement of tenancy.

8. At the cost of repetition, it may be worth mentioning that the Plaintiff is seen to have come before the Court with a candid admission, and with no suppression, that in first notice issued to the defendant, he averred that the tenancy commenced from 8th day of month. Tenant replied the notice and stated that the tenancy commenced from first day of month. However, in second notice issued by landlord-plaintiff, he had corrected his stand as per defendant's version, and proceeded on the foundation that the tenancy commenced from 1st day of the month.

9. In so far as the first question about notice is concerned, the Trial Court recorded a finding that the tenancy commenced from first day of month. This

finding is reached on the basis of testimony of the plaintiff and the admission of the defendant in his reply to plaintiff's notice [Exh.105] and subsequent letters [Exhs. 108 and 109]. Thus, the finding that the tenancy has commenced from the first day of the Gregorian calendar month is based on defendant's version and admission on which landlord plaintiff has acted by giving up his initial stand.

10. The finding of the Trial Court about the date of commencement of month of tenancy to be first day of the month is confirmed by the First Appellate Court, and it cannot be faulted on the ground that in earlier correspondence, the plaintiff claimed commencement of tenancy from a particular date in view of fact that in later correspondence the plaintiff has rectified his stand conforming to the defendant's plea. The defendant cannot now change his stance to attack on the legality of the notice based on plaintiff's first notice, in which plaintiff had claimed that the tenancy commenced from 8th of every

month.

11. Now, this Court would proceed to examine the defendant-appellant's plea about whether Courts below were right in proceeding with the suit, treating that the defendant's defence was struck off.

12. According to the appellant, the power to strike off defence available under Rule 11 of Order 39 of Civil Procedure Code is not available in Section 35B of Civil Procedure Code. According to the appellant, Section 35B of Civil Procedure Code lays down a totally different scheme, and, therefore, it is competent for the Court to order the cost and make it payable at once. Therefore, failure to pay such costs shall not entail dismissal of suit, or striking off of the defence, as the case be. Learned Advocate for appellant, based on aforesaid contention, argued that the appellant did not get reasonable and fair opportunity of trial.

13. Though the defendant's defence was struck off nevertheless, relying upon Supreme Court Judgment in case of **Modula India Vs. Kamakshya Singh Deo** [AIR 1989 SC 162], the defendant was allowed to cross-examine and exert to shatter the plaintiff's story without opening his own plea.

14. The fate of validity or worth ground raised by appellant as to interpretation of Section 35 depends on how this Court would construe Section 35B of Civil Procedure Code.

15. In **M/s. Vernekar Industries, Panjim, Goa Vs. M/s. Starit Engineering Co. Pvt. Ltd., Bombay** [AIR 1985 Bombay 253], this Court had occasion to lay down a correct interpretation of Section 35B, Civil Procedure Code.

It was a case where the costs were ordered as a condition precedent for proceeding with the suit. The suit was proceeded, however, costs were not paid. The unpaid costs were included in the Bill of Costs.

In the notice of motion, the matter came up before this Court on the justifiability of action of Office in including the amount of costs ordered under Section 35B, Civil Procedure Code, in the Bill of Costs. This Court held that the non-payment of costs ordered under Section 35B would entail the result of dismissal of suit, or striking off of the defence if the costs are not paid. However, the costs so awarded irrespective of the consequence as to dismissal of suit or striking off of defence would be capable of being recovered by including it in the Bill of Costs.

16. Full Bench of Punjab High Court has also construed Section 35B in its Judgment in case of **Anand Prakash Vs. Bharat Bhushan Rai and another** [AIR 1981 Punjab & Haryana 269],which renders the defendant's arguments untenable, and fortifies the view taken by this Court.

17. In so far as the question of Section 35B of Civil Procedure Code is concerned, if the contention

of the defendant that Section 35B does not admit an interpretation where the Court would be competent either to dismiss the suit or strike off defence, if order as to costs is not complied with, it would render the scheme of Section 35B totally nugatory. The situation, as may be in existence prior to enactment of Section 35B, and as would be obtainable after enactment of Section 35B, would be rendered with no difference. When law permits that the Court shall be competent not to permit the suit to proceed if the costs are not paid as well the defence not to be proceeded, only consequence is, as the case may be, dismissal of suit, or striking off the defence.

18. The situation further contemplates that by virtue of Sub-section (2) of Section 35B of Civil Procedure Code, in a given case, if the suit is proceeded or defence is permitted to be taken, or suit is proceeded without permitting the defence, the cost of delay could be recoverable by adding it in the Bill of Cost.

19. In view of this discussion, this Court finds that no piece of evidence that was on record has remained to be considered.

20. The finding of fact recorded at the first appellate stage is final, in so far as the date of commencement of tenancy, as well as right of appellant for further opportunity of trial is concerned.

21. The conduct of defendant, as seen from record, is such that he has all throughout tried to pressurize and browbeat the Presiding Officer of Trial Court. Even the language of applications on record is grave enough that the defendant would not be entitled to invoke or earn any sympathy on ground, whatsoever. This conduct of appellant is obvious even without reference to contempt proceedings taken against appellant in this very matter where he has escaped the action by tendering apology before this

Court.

22. The finding of fact being final at first appellate stage and that the Second Appeal cannot be a third trial, no merit is found in this appeal.

Appeal is dismissed with costs.

JUDGE

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